

Rodgers C. [Environmental Governance and Land Use Policy in Tension? Applying Environmental Impact Assessment to Intensive Agriculture](#). In: Cardwell, M; McMahon, J, ed. *Research Handbook on EU Agriculture Law*. London, UK: Edward Elgar, 2015, pp.20.

**Copyright:**

©2015 Edward Elgar Publishing.

This is the author manuscript of a book chapter published in Research Handbook on EU Agriculture Law. The chapter is for private use only and cannot be used for any other purpose elsewhere.

**Link to website:**

<http://www.e-elgar.com/shop/research-handbook-on-eu-agriculture-law>

**Date deposited:**

27/11/2015

**Embargo release date:**

01 April 2016



This work is licensed under a [Creative Commons Attribution-NonCommercial-NoDerivatives 4.0 International licence](#)

## Chapter 7

### Environmental Governance and Land Use Policy in Tension? Applying Environmental Impact Assessment to Intensive Agriculture<sup>1</sup>

Christopher Rodgers

#### 1. Introduction

European environmental law is increasingly exerting a strong influence on both the shape, and the extent and range, of land use controls applied to agriculture. The principal agent for this shift in the regulatory framework has been the introduction of environmental impact assessment (“EIA”) in 1985<sup>2</sup>. Agriculture has in the United Kingdom (UK) been largely free from planning controls and other regulatory requirements, due in large part to the exemption of agricultural land use from the planning regime by the Town and Country Planning Act 1947 and its successors. The architecture of the post-war planning settlement remains largely intact. However, it is becoming increasingly clear that the introduction of EIA, a key instrument of European Union environmental law, is now driving an extension of regulatory control over land use with major implications for agriculture.

The introduction of EIA for some changes in land use (for example, intensifying production on semi-natural land) represents a major extension of regulatory control into an area previously untouched by legal controls. This may be seen as a direct response by European environmental policy to the now widely recognized and damaging impacts of intensive and industrial scale agriculture on the natural environment across the EU. In the domestic context, environmental law has also had more subtle impacts on the governance of land use, both within the town and country planning system itself and in land use controls applied through other governance structures. The need to interpret British legislation so as to implement EU law<sup>3</sup> has led to an extension of planning law into areas previously outside its remit; and, in those areas where the planning regime is (and remains) inapplicable, it has resulted in the creation of new regulatory mechanisms requiring the prior approval of land use proposals by public bodies. It has also resulted in a narrowing of the discretion exercisable by decision makers in some cases, including cases where local planning authorities have to consider agricultural land use proposals that have potentially damaging environmental impacts.<sup>4</sup>

---

<sup>1</sup> I am grateful to Ann Sinclair for research assistance on a wider project on EIA for rural land projects, and which contributed to this paper; and to Michael Cardwell and Joe McMahon for comments and suggestions on earlier drafts. Any remaining errors are mine.

<sup>2</sup> By Council Directive 85/337/EEC on the assessment of certain private and public projects on the environment, [1985] OJ L175/40.

<sup>3</sup> See Case C-106/89 *Marleasing SA v La Comercial Internacional de Alimentacion SA* [1990] ECR I-4135, at I-4159; *R (on the application of SAVE Britain's Heritage) v Secretary of State for Communities and Local Government* [2011] EWCA Civ 334; and *R (on the application of Save Woolley Valley Action Group) v Bath and North East Somerset Council* [2012] EWHC 2161 (Admin) (discussed below).

<sup>4</sup> On the latter, see generally G. Jones, ‘The Impact of Environmental Law on Planning Decision Making’, JPEL Occasional Paper 22 (2012).

## 2. Environmental Governance of Agricultural Projects

The Environmental Impact Assessment Directive (EIA Directive) requires Member States to ensure, before consent to certain types of development is given, that ‘projects’ likely to have a ‘significant effect’ on the environment by virtue of their nature, size or location are made subject to an assessment of their environmental effects.<sup>5</sup> Those ‘projects’ potentially attracting the need for an EIA are very widely defined in Article 1(2) to include not only construction works or the execution of schemes or ‘installations’, but also ‘other interventions in the natural surroundings and landscape’. This is a potentially open ended category that stretches the theoretical scope of EIA to many agricultural activities – including some that do not involve ‘development’ in the sense that the term is commonly understood in a planning context.<sup>6</sup>

The EIA Directive allows the Member States to integrate the required assessment into existing administrative procedures for development or project consent. This was done in the UK by adding the EIA requirements to the Town and Country Planning procedures for granting planning consent.<sup>7</sup> Several categories of agricultural development potentially require an EIA under the terms of the Directive. The only category for which one is mandatory in every case is the provision of livestock facilities for the intensive rearing of pigs or poultry.<sup>8</sup> A larger number of agricultural operations are caught by Annex 2 to the Directive, which requires an EIA if, having regard to its characteristics size and/or location, an Annex 2 project is ‘likely’ to have a ‘significant’ effect on the environment. The Member States can either undertake a case-by-case examination of projects for establishing the significance of effects, or set thresholds or criteria to determine whether projects fall within the Annex 2 criteria and should therefore be subject to environmental assessment.<sup>9</sup> The transposing regulations in both England and Scotland, and guidance to local planning authorities on their application, relies upon indicative thresholds for identifying Annex 2 projects of different kinds that may require an EIA.<sup>10</sup>

---

<sup>5</sup> Directive 2011/92/EU of the Council and the European Parliament on the assessment of the effects of certain private and public projects on the environment, [2011] OJ L26/1. The 2011 Directive consolidated amendments to the original EIA Directive (Council Directive 85/337/EEC, [1985] OJ L175/40) and made by: Directive 97/11/EC, [1997] OJ L73/5; Directive 2003/35/EC, [2003] OJ L156/17; and Directive 2009/31/EC, [2009] OJ L140/114. The Directive has most recently been amended by Directive 2014/52/EU of the European Parliament and of the Council, [2014] OJ L 124/1. The 2011 consolidated text of the EIA Directive (as amended by Directive 2014/52/EU) will be referred to hereafter as “the EIA Directive”.

<sup>6</sup> ‘The carrying out of building, engineering, mining or other operations in, on, over or under land, or the making of any material change in the use of any buildings or other land’: Town and Country Planning Act 1990, Section 55(1).

<sup>7</sup> By the Town and Country Planning (Assessment of Environmental Effects) Regulations 1988, SI 1988/1199. The Regulations currently applicable in England and Wales are the Town and Country Planning (Environmental Impact Assessment) Regulations 2011, SI 2011/1824; and see DETR Circular 02/1999, ‘Environmental Impact Assessment’. The Regulations currently in force in Scotland are the Town and Country Planning (Environmental Impact Assessment) (Scotland) Regulations 2011, SSI 2011/139.

<sup>8</sup> EIA Directive, (above n 3) Annex 1, para. 17. It applies thresholds calculated by reference to the number of places for livestock provided by each facility.

<sup>9</sup> Ibid, Article 4(2) and Annex III.

<sup>10</sup> Town and Country Planning (Environmental Impact Assessment) Regulations 2011 SI 2011/1824, Schedule 2; Environmental Impact Assessment (Scotland) Regulations 2011, SSI 2011/139, Schedule 2; DETR Circular 2/99, ‘Environmental Impact Assessment’; Scottish Executive Circular 15/1999, ‘The Environmental Impact Assessment (Scotland) Regulations 1999’. The thresholds are set out in the right hand column of Schedule 2 in each case and explained further in Annex A of the Circulars.

Where an EIA is required, the developer must provide an environmental statement which includes information about the effects of the proposed operation, both directly and indirectly, on a range of specified matters *viz.* human beings, flora and fauna, soil, water, air, climate and landscape, material assets and the material heritage.<sup>11</sup> The statement must be put to public consultation and all environmental information gathered during the consultation must be considered before a decision to grant or refuse permission for the project is given.<sup>12</sup> The EIA Directive is directly effective, and a decision to grant planning permission which ignores these requirements will be open to judicial review for incompatibility with EU law, even if it complies with the relevant English or Scottish transposing regulations.<sup>13</sup>

Of the agricultural operations identified in Annex 2 to the EIA Directive, and therefore potentially subject to EIA, three have proved especially problematic: (i) projects for the restructuring of rural land holdings; (ii) projects for the use of uncultivated land or semi-natural areas for intensive agricultural purposes; and, (iii) intensive livestock installations (other than those covered by Annex 1). If a project falling within either category involves ‘development’, then its potential environmental impacts will be considered in the context of the planning legislation, and an application for planning permission will be ‘screened’ to determine whether an EIA must be carried out when development consent is being considered. In a planning law context, the indicative threshold for assessing whether the environmental impact of projects to convert uncultivated or semi-natural areas to intensive agriculture is likely to be significant, and therefore require an EIA, is whether the area of the development exceeds 0.5 hectares.<sup>14</sup> In the case of intensive livestock installations the threshold is fixed by reference to the ground area of the building or facility – if more than 500 square metres, then the relevant threshold indicates that an EIA will normally be required<sup>15</sup>.

If the project does not involve operational ‘development’<sup>16</sup>, then it falls outside the ambit of the planning regime. In this case an EIA may be required under the bespoke EIA Agriculture Regulations which require certain projects to be screened by Natural England; and, where significant environmental effects are likely, it will require an environmental statement to be submitted to them for approval before the project can be carried out.<sup>17</sup> For the purpose of distinguishing this administrative consenting procedure from those applied in planning law, it will be referred to as “Agricultural EIA” in this chapter. The thresholds for assessing the like-

---

<sup>11</sup> EIA Directive, (above n 3) Article 5 and Annex IV.

<sup>12</sup> Town and Country Planning (Environmental Impact Assessment) Regulations 2011, SI 2011/1824, Regulation 3(2).

<sup>13</sup> See, e.g., *Berkeley v Secretary of State for the Environment Transport and the Regions and Fulham Football Club* [2001] Env. LR 16 (Lord Hoffman).

<sup>14</sup> See Town and Country Planning (Environmental Impact Assessment) Regulations 2011, SI 2011/1824, Schedule 2, para. 1(a), and column 2; and SSI 2011/139, Schedule 2, para. 1(a), column 2

<sup>15</sup> Town and Country Planning (Environmental Impact Assessment) Regulations 2011, SI 2011/1824, Schedule 2, para. 1(c), and column 2

<sup>16</sup> I.e. within the meaning of sections 55 and 57 Town and Country Planning Act 1990

<sup>17</sup> Environmental Impact Assessment (Agriculture) (England) (No 2) Regulations 2006, SI 2006/2522, Regulation 5 and Schedule 1. For Scotland, see Environmental Impact Assessment (Agriculture) (Scotland) Regulations 2006, SSI 2006/582. (Hereafter collectively referred to as “the EIA Agriculture Regulations”).

likelihood of ‘significant’ environmental effects are set by reference to the area of land to be developed or reconfigured. In the case of uncultivated land projects, this is 2 hectares; for restructuring projects involving the removal or addition of field boundaries, it is 4 kilometres (2 kilometres if the land is in a sensitive area); for restructuring projects involving an area of land, it is 100 hectares (50 hectares if the land is wholly or partly in a sensitive area); and, if the project involves redistributing earth or other material in relation to land, the threshold is 10,000 cubic metres (2,000 cubic metres if the land is in a sensitive area)<sup>18</sup>.

It therefore follows that in cases of restructuring land holdings or converting semi-natural areas to intensive agriculture a key question will be whether a project involves operational development requiring an application for planning consent to the local planning authority. If it does, then the project will require planning consent under the planning legislation and any decision as to EIA will be determined by the screening of the planning application. If it does not involve ‘development’, then it may still require EIA, but this will be determined under the bespoke administrative consenting arrangements for agricultural EIA operated by Natural England under the EIA Agriculture Regulations.

Planning law has precedence in the governance arrangements for the application of EIA to rural land use projects: if a project involves “development” this will bring the Town and Country Planning legislation into play and take the project outside the remit of the EIA Agriculture regime. The scope of the definition of ‘development’ under the 1990 Planning Act is therefore fundamental to an understanding of the governance arrangements for the application of EIA to agricultural land use projects. In several recent planning cases, expansive judicial interpretation of the concept of operational development, and thus of the potential scope of EIA, could lead to a radical reconfiguration of the legal landscape at the interface between agriculture and the natural environment. It also has much to say about the relationship between agricultural law and environmental law, and their respective legal domains. Before we can consider the full implications of the case law under the planning regime, it is first necessary to consider the scope and context for the EIA Agriculture Regulations, and the bespoke administrative consenting regime they now apply to some agricultural intensification projects.

### **3. ‘Agricultural’ EIA: Restructuring and Intensification Projects**

Since the first adoption of the EIA Directive in 1985, the UK has had difficulty with two of the principal Annex 2 categories of agricultural project requiring an EIA – projects for the restructuring of rural land holdings and projects for the use of uncultivated land or semi-natural areas for intensive agricultural purposes. For many years the UK failed to adequately implement the EIA Directive’s requirements in its land use legislation. As part of a deal to secure the withdrawal by the European Commission of legal proceedings before the Court of Justice of the EU (CJEU) in relation to five specific projects, the UK reluctantly conceded in 1992 that EIA should be applied to projects for the use of uncultivated and semi-natural areas

---

for intensive agriculture.<sup>19</sup> It took another nine years, however, before regulations were introduced in 2001<sup>20</sup> to create a bespoke administrative consent procedure for changes of land use within these categories – originally administered by the Department for Environment, Food and Rural Affairs (DEFRA), and into which the requirement for an EIA could be integrated.

Nonetheless, the introduction of EIA for changes in land use to facilitate intensive farming did not fully transpose the EIA Directive, for the 2001 regulations failed to also subject projects to restructure land holdings to an EIA. Revised EIA Agriculture Regulations of wider scope and application were therefore introduced in 2006<sup>21</sup>, and these now subject projects in both categories to a requirement of prior consent from Natural England, or (in Scotland) the Scottish Government Rural Payments and Inspections Directorate (SGRPID), before they can be lawfully undertaken. More precisely, an EIA, with requirements for the service of an environmental impact statement and subsequent public consultation, is required if Natural England or SGRPID adopt a screening decision that the project would be likely to have significant effects on the environment.

It is clear from the Natural England and Scottish Executive guidance on these procedures that they were intended to impose ‘light touch’ regulation.<sup>22</sup> Further, statistics on screening decisions by Natural England confirm the marginal impact of the regulations in practice – in only 42 cases out of a total of 880 projects considered by Natural England between 5 October 2006 and 31 December 2013 was the submission of an environmental statement required.<sup>23</sup> The largest number of screening decisions relate to projects for the conversion of uncultivated and semi-natural land, with only 14 cases where a screening decision was required in relation to projects to restructure landholdings, although a much higher *proportion* of this type of project (3 out of the 14) were deemed to require an environmental statement and full EIA.<sup>24</sup> By contrast, out of 866 cases where a screening decision was required in relation to an uncultivated land project, a mere 39 were adjudged to be likely to have significant effects, and to require the submission of an environmental impact statement for project approval. Nevertheless, most of the screening decisions for uncultivated land projects were for conversion of

---

<sup>19</sup> See J. Holder, *Environmental Assessment: the Regulation of Decision Making* (Oxford University Press, 2004) for the background to the political deal struck at the time: at 50.

<sup>20</sup> The Environmental Impact Assessment (Uncultivated Land and Semi Natural Areas) (England) Regulations 2001, SI 2001/3966.

<sup>21</sup> The Environmental Impact Assessment (Agriculture) (England) (No 2) Regulations 2006, SI 2006/2522; in Scotland, the Environmental Impact Assessment (Agriculture) (Scotland) Regulations 2006, SSI 2006/582 (above note 17).

<sup>22</sup> See Scottish Executive Government Rural Affairs Department, ‘Guidelines on Environmental Impact Assessment (EIA) for Agriculture’ (Scottish Executive Government & Rural Affairs Department, 2006), available at <http://www.scotland.gov.uk/Resource/Doc/30701/0044119.pdf>; and Natural England, ‘Environmental Impact Assessment (Agriculture) (England) (no.2) Regulations 2006: Public Guidance’ (NE311) (Natural England, 2012), available at <http://publications.naturalengland.org.uk/publication/4038539>.

<sup>23</sup> See the Public Register of screening decisions under the Environmental Impact Assessment (Agriculture) (England) (No.2) Regulations 2006, available at [http://www.naturalengland.org.uk/Images/eia-publicregister\\_tcm6-6275.pdf](http://www.naturalengland.org.uk/Images/eia-publicregister_tcm6-6275.pdf).

<sup>24</sup> Ibid, at Section (ii) ‘Projects that physically restructure land holdings’.

grassland heath and moorland, and the EIA regulations have a potentially important role to play in preserving biodiversity on rich semi-natural grassland.

The identification of ‘projects’ to which the EIA Agriculture Regulations apply requires two tests; a *determination test* (is the land uncultivated land or a semi-natural area?) and an *operational test* (are the works proposed for intensive agricultural purposes?). Land will be considered to be uncultivated if it has not been subject to physical or chemical cultivation in the last 15 years.<sup>25</sup> There is, however, no definition of ‘semi-natural area’ in the EIA Agriculture Regulations, and Natural England uses the Biodiversity Broad Habitat Classification published by the Joint Nature Conservation Committee (JNCC)<sup>26</sup> as a guide to different habitat types which may constitute such areas.<sup>27</sup> The determination test for semi-natural land projects is not without difficulties. In the first place, the test as operated by Natural England places heavy reliance on ecological criteria, as may be expected given its statutory nature conservation role – but the required criteria for screening in the EIA Directive are much wider and encompass (for example) landscape, historical and archeological features.<sup>28</sup> The test focuses rather on the species of plant found on the land in question, and criteria have been developed for a variety of habitat types including unimproved acid and neutral grasslands, upland dwarf shrub heath and moorland, scrubland, and for coastal habitats and for standing water and canals.<sup>29</sup>

The operational test is also not without difficulty. It is broadly interpreted in the EIA Agriculture Regulations to mean ‘a project to increase the productivity for agriculture of uncultivated land or a semi-natural area and includes projects to increase the productivity for agriculture of such land to below the norm’.<sup>30</sup> Natural England’s public guidance specifies physical cultivation by means of ploughing, harrowing or rotovating, chemical enhancement of soil, sowing seed and draining land or clearing existing vegetation (physically or with herbicides) – but makes it clear that this is not an exhaustive list.<sup>31</sup> Although this is potentially very wide, it has significant limitations and will not catch some categories of ecologically damaging practice. These might include, for example, activities that benefit from permitted development rights under the General Development Order, such as erecting small farm buildings or making farm tracks and spreading soil,<sup>32</sup> as the Order does not apply ecological controls to limit

---

<sup>25</sup> Natural England, ‘Environmental Impact Assessment (Agriculture) (England) (no.2) Regulations 2006: Public Guidance’ (NE311) para. 33.

<sup>26</sup> D.L. Jackson, (2000) *Guidance on the Interpretation of the Biodiversity Broad Habitat Classification (Terrestrial and Freshwater Types): Definitions and the Relationship with Other Classifications*, JNCC Report 307.

<sup>27</sup> Natural England, ‘Environmental Impact Assessment (Agriculture) (England) (no.2) Regulations 2006: Public Guidance’ (NE311) para. 35-7 and Table at 9.

<sup>28</sup> See Directive 2011/92/EU as amended, art.4.3 and Annex III. Concerns as to the scope of the screening criteria applied to agricultural projects were expressed in the review of the operation of the 2001 regulations undertaken for English Nature in 2004: *The Effectiveness of Environmental Impact Assessment (EIA) for Uncultivated Land and Semi Natural Areas*, English Nature Research Report 605 (2004) para. 3.1.1 and para. 4.1.4. The wording of art.4.3 of the Directive is unambiguous: “Where a case by case examination is carried out or threshold or criteria are set [for screening applications] *the relevant selection criteria set out in Annex III shall be taken into account*” (emphasis added).

<sup>29</sup> Natural England, ‘Environmental Impact Assessment (Agriculture) (England) (no.2) Regulations 2006: Public Guidance’ (NE311) Table at 9.

<sup>30</sup> EIA Agriculture Regulations, (above n 17) Regulation 2(1)(g).

<sup>31</sup> Natural England, ‘Environmental Impact Assessment (Agriculture) (England) (no.2) Regulations 2006: Public Guidance’ (NE311) para. 32.

<sup>32</sup> See the Town and Country Planning (General Permitted Development) Order 1995, SI 1995/418, Schedule 2, Part 6 (Agricultural Buildings and Operations).

or condition the exercise of permitted development rights. It will also be very difficult to capture and assess agricultural intensification where it occurs gradually over a long period of time, such as the increased use of fertilizer or increasing stocking levels of livestock.<sup>33</sup>

The operational test for restructuring projects is perhaps less problematic. This will apply wherever there are physical operations which give a ‘significantly different physical structure to the arrangement of one or more agricultural holdings’ and will include the removal of substantial lengths of field boundary (such as hedge banks fences walls or ditches) or the recontouring of the land by moving large quantities of earth.<sup>34</sup> Normally at least four kilometers of field boundary will have to be involved, or the movement of 10,000 cubic metres or more of earth. The operational test lacks ecological focus in some respects. For example, maintenance work is excluded from the definition and will not engage the Regulations, and this is defined to include work on existing structures, including clearing blocked or clogged ditches. Clearly, clearing drainage ditches could have very ‘significant’ ecological implications if it affects water levels in surrounding fields and field margins, quite apart from the effects on invertebrates and other wildlife that may establish themselves in ditches over a period of time if they are left uncleared.

The procedure for screening applications that exceed the thresholds differs from that applicable in planning cases. Where a project exceeds the relevant threshold, the project proponent must make a screening application. Natural England then has 35 days in which to issue a screening decision.<sup>35</sup> If they decide that the project is likely to have significant effects on the environment, having regard to the public guidance on the EIA Agriculture Regulations and the relevant thresholds, then the project may not proceed without consent. If it is adjudged not to have significant effects, then the screening decision will indicate that the project may proceed without consent – but it must be commenced within 3 years of the screening decision.<sup>36</sup> There is provision for consultation on screening applications with any of the consultation bodies *viz.* English Heritage, the Environment Agency and any other public body which Natural England or the Secretary of State considers has an interest relevant to the project.<sup>37</sup> There is no provision for public consultation at the screening stage, although any screening decision must be kept in a public register and available for public consultation at all reasonable times.<sup>38</sup>

If a project is screened and found to be a ‘significant project’, then an environmental statement must be submitted with an application for consent – and this will be put to public consultation and publicized on Natural England’s website and in a local newspaper inviting representations within six weeks of the notice.<sup>39</sup> The decision on consent can be made with or without conditions. When making its decision on a significant project, Natural England must have regard to the environmental statement submitted by the developer, any additional environmental information submitted (for example) by the statutory consultees and members of the public; and it must also consider ‘any social or economic impacts which might result from

---

<sup>33</sup> See *The Effectiveness of Environmental Impact Assessment (EIA) for Uncultivated Land and Semi Natural Areas*, English Nature Research Report 605 (2004) para. 3.1.2.

<sup>34</sup> See Natural England, ‘Environmental Impact Assessment (Agriculture) (England) (no.2) Regulations 2006: Public Guidance’ (NE311) paras. 46-49

<sup>35</sup> EIA Agriculture Regulations, (above n 17) Regulation 8(2).

<sup>36</sup> *Ibid.*, Regulation 8(9).

<sup>37</sup> *Ibid.*, Regulations 8(3) and 2(1).

<sup>38</sup> *Ibid.*, Regulation 8(4)(b).

<sup>39</sup> *Ibid.*, Regulation 12(5).



a decision to refuse consent for the project'.<sup>40</sup> This could include, for example, economic or financial implications, including those for the proponent's farm enterprise.

Three points about the screening and consent arrangements merit comment. First, by structuring the decision-making matrix in such a way that the actual decision on whether projects can proceed is made, in the overwhelming majority of cases, in the screening decision, the schema of the regulations excludes public participation on the merits of most projects. This would appear to be at variance with the requirements of the EIA Directive itself, which requires that 'the public shall be given early and effective opportunities to participate in the environmental decision making procedures referred to in Article 2.2 and shall for that purpose be entitled to express comments or opinions when all options are open to the competent authority ... before the decision on the request for development consent is given'.<sup>41</sup> Second, the admissibility of social and economic criteria in the decision-making matrix will, in the last resort, potentially subordinate environmental considerations to wider non-environmental criteria, including potentially the financial position of the project proponent and his/her farm business, and its economic impacts on the local agricultural economy and rural society. Third, there is no provision for the imposition of conditions in a screening decision. As the overwhelming majority of applications are consented by this means, the result is that there is no mechanism available to the conservation body to impose conditions mitigating the environmental impacts of projects which may be above the thresholds for an EIA, but which have not been deemed to be 'significant' projects. This was an omission in the regime that was highlighted in research for English Nature as long ago as 2004, and weakens the purchase of the EIA Regulations on potentially damaging land use proposals. It also deprives Natural England of a useful tool to secure improvements to the rural environment when agreeing proposals without a full EIA under those Regulations.<sup>42</sup>

#### **4. The Expanding Scope of the Planning System**

Until very recently, little attention has been paid to the possibility that projects in either of the problematic categories – that is, projects to restructure holdings or to convert semi natural areas to intensive farming use – might also stray into the territory of planning law. More specifically, that projects in either category might, in other words, involve 'development' for the purposes of the planning legislation and therefore require an EIA under planning law rather than under the EIA Agriculture Regulations. That this might be the case was highlighted in *R (on the application of Wye Valley Action Association Ltd) v Herefordshire District Council*.<sup>43</sup> Further, the generally accepted approach in most planning cases had been to assess *first* whether a project was 'development' requiring planning permission; and then, if that were the case, to go on, *second*, to consider whether it was also subject to a requirement of an EIA as part of the subsequent development consent decision. It is clear from several recent cases that this is no longer the case where a development falls within the EIA Directive.

Despite its complexity, some of the most important concepts and definitions employed in planning law remain both frustratingly vague and open to interpretation. 'Development' is one such concept, notwithstanding its key role in defining the scope and application of devel-

---

<sup>40</sup> Ibid, Regulation 16(2).

<sup>41</sup> See Directive 2011/92/EU as amended, Article 6(2).

<sup>42</sup> See *The Effectiveness of Environmental Impact Assessment (EIA) for Uncultivated Land and Semi Natural Areas*, English Nature Research Report 605 (2004) 52 (recommendations).

<sup>43</sup> [2009] EWHC 3428 (Admin), [2010] Env LR 18; [2011] EWCA Civ 20.

opment control - planning permission will only be required for operations that constitute 'development' on agricultural land.<sup>44</sup> As indicated, 'development' is widely defined to include 'the carrying out of any building, engineering, mining, or other operations in, on, over or under land, or the making of any material change in the use of any buildings or other land'.<sup>45</sup> Following amendments made by the Planning and Compensation Act 1991, building operations requiring permission also include the demolition of buildings, rebuilding or alterations to buildings and 'any other operations normally undertaken by a person carrying on business as a builder'.<sup>46</sup> The term 'operations' has a technical meaning in this context and has been held to cover any activity which results in some physical alteration to the land itself, and which has some degree of permanence.<sup>47</sup>

In the agricultural context, the definition of 'development' is shaped in part by what is *not* to be so classified. The 1990 Act stipulates that, 'the use of any land for the purposes of agriculture or forestry ... and the use for any of those purposes of any building occupied together with land so used' does not constitute development,<sup>48</sup> and therefore does not require planning permission. This means that a change of use of land or existing buildings from a non-agricultural use to an agricultural use does not require planning permission. Similarly, this provision has the effect of exempting from planning control a change in the *use* of land or pre-existing buildings from one agricultural use to another. If it is proposed to erect new buildings, however, or to modify or extend existing buildings, then planning permission will be required – either expressly or by virtue of permitted development rights granted by the General Development Order.<sup>49</sup>

A key question, therefore, for the potential application of development control to projects for agricultural development is how are 'building operations' in, on or over the land to be defined? The general rule, until challenged recently (for example, in *R (on the application of Save Woolley Valley Action Group Ltd) v Bath and North East Somerset Council*<sup>50</sup>), was that merely placing an existing structure on agricultural land will not constitute a building operation requiring permission. If the structure's intended use is agricultural, there will be no building operation or material change of use and planning permission will not be needed. So, for instance, the placing of a residential caravan on agricultural land, for the purpose of providing a weatherproof store and mixing place for cattle food, was held in *Wealden District Council v Secretary of State for the Environment* not to constitute 'development' - and thus did not require planning permission.<sup>51</sup> The placing of an object or structure (such as a caravan for temporarily housing seasonal farm workers) on the land will only be outside planning control, however, if its siting and intended user is ancillary to the agricultural use of the relevant *planning unit*. This is a planning concept, and is not necessarily coterminous with the

---

<sup>44</sup> Town and Country Planning Act 1990, Section 57.

<sup>45</sup> Ibid, Section 55(1).

<sup>46</sup> Ibid, Section 55(1A), added by Planning and Compensation Act 1991, Section 13.

<sup>47</sup> See *Parkes v Secretary of State for the Environment* [1979] 1 All ER 211

<sup>48</sup> Town and Country Planning Act 1990, Section 55(2)(e)

<sup>49</sup> Town and Country Planning (General Permitted Development) Order 1995, SI 1995/418, Schedule 2, Part 6 (Agricultural Buildings and Operations).

<sup>50</sup> [2012] EWHC 2161 (Admin) (Lang J.).

<sup>51</sup> (1988) 56 P & CR 286, CA.

land owned or occupied by the landowner.<sup>52</sup> The key test here is whether the intended use is ancillary to the primary use of the planning unit, which must itself be agricultural.<sup>53</sup>

Ancillary activities carried out on an agricultural holding are only within the planning exemption for agricultural user if they are themselves agricultural in nature and, further, incidental to a *primary* user of the holding/planning unit which is again agricultural. In practice, the question often resolves itself into the extent to which an activity can truly be said to be ‘ancillary’ to some other principal agricultural use. So, for example, in *Pittman et al v. Secretary of State for the Environment*, an agricultural holding was divided into plots and sold.<sup>54</sup> The plots were occupied as ‘leisure’ plots with stationary caravans *in situ* and mains facilities, and some subsidiary livestock husbandry was carried on. The husbandry was, on the facts, held to be ancillary to a new principal user – providing leisure and holiday facilities – and this resulted in a material change of use of the land from its former agricultural use. Ultimately, whether there has been a ‘material’ change of use is a question of fact and degree to be decided on the facts of each individual case.<sup>55</sup>

Against this background, the expansion of the scope and meaning of ‘development’ for planning purposes, and with it the range and scope of development control over agricultural operations, can be illustrated by three recent cases. These also raise important questions about the legal understanding of “intensive” agriculture – and of how issues of “intensity” are assessed and benchmarked both in planning law, and in other regulatory contexts (for example in the application of the Agriculture EIA regulations)<sup>56</sup>.

*a. R (on the application of Hall Hunter Partnership) v Secretary of State*

The difficulty of determining the parameters of ‘development’ involving temporary structures intended to facilitate intensive agriculture was first illustrated in *R (on the application of Hall Hunter Partnership) v Secretary of State*.<sup>57</sup> The farmer in this case had bought a farm on the outskirts of Godalming in Surrey and developed an extensive business growing soft fruit. This required the use of a large number of Spanish polytunnels during the growing season, typically between February and November each year. In 2004 45.6 hectares of the farm was covered in polytunnels at different times. In 2005 this increased to a cumulative total of 60 hectares, with peak coverage of 39 hectares at any one time. The business employed 230 seasonal workers, who were housed in 45 caravans – each fitted out with gas and electricity supply, a bathroom and water. The Council served two enforcement notices – one alleging a

---

<sup>52</sup> ‘What the local authority are entitled to look at is the whole of the area which was used for a particular purpose including any part of that area whose use was incidental to, or ancillary to, the achievement of that purpose’: *G. Percy Trentham Ltd v Gloucestershire CC* [1966] 1 WLR 506, 513 (Diplock LJ).

<sup>53</sup> See *Allen v Secretary of State and Reigate and Banstead BC* [1990] JPL 340 (material change of use requiring planning permission found where only 8% of plants and shrubs sold from a farm shop were not grown on the premises).

<sup>54</sup> [1988] JPL 391.

<sup>55</sup> See *Birmingham Corporation v Minister of Housing and Local Government* [1964] 1 QB 164; and *James v Minister of Housing and Local Government* [1967] 1 WLR 171.

<sup>56</sup> Considered below, at page x (d. “Intensive” Farming and the Natural Environment”)

<sup>57</sup> [2006] EWHC 3482 (Admin).

change of use from agriculture to the stationing of caravans without planning permission, and the other alleging that the erection of the polytunnels was development requiring planning permission. The planning inspector turned down appeals against the enforcement notices on both counts and the applicant appealed to the courts under Section 174 of the 1990 Act.

The primary question on appeal was whether the erection of the polytunnels should be regarded as building operations requiring planning permission. None had been obtained, so, if the answer was ‘yes’, the enforcement notice must be upheld. As we have seen, the planning legislation and case law (some of which is considered above) are singularly unhelpful to attempts to define building operations. In the leading case of *Skerrits of Nottingham Ltd v Secretary of State (No.2)* the Court of Appeal reviewed earlier cases and held that in order to assess whether an activity constitutes a ‘building operation’ the court will ask itself, in the first instance, whether it will produce a ‘building’, in other words a structure of the requisite permanence.<sup>58</sup> If it does, then the operations required to produce it will be building operations and will require planning permission.

There is, of course, an element of circularity in this exercise. In essence, however, the necessary degree of permanence requires a consideration of two separate elements: (i) does the structure have the required degree of physical attachment to the ground to be regarded as permanent? This is a matter of fact and degree for the planning inspector, and (ii) does the structure have the requisite degree of permanence in temporal terms, in other words is it to remain *in situ* for a sufficient period of time to be a permanent structure on the land? In the *Hall Hunter* case the planning inspector found that it took a team of 10 men 45 man hours to erect one acre of polytunnels, and a further 32 man hours to dismantle them. Machines were required to screw the metal posts used to anchor the frames into the ground, and to bend the metal frames into arcs to create the hoops over which plastic was then affixed. It was estimated that one 4 hectare block had taken over 430 man hours work to assemble and over 300 to dismantle. The polytunnels therefore had a substantial degree of physical attachment to the ground.

As regards the second element, the degree of permanence in temporal terms, the polytunnels were moved regularly and stayed in the same place for between 3 and 7 months each. It was established in the *Skerrits* case that, to be regarded in legal terms as ‘permanent’, a structure does not have to remain in the same place indefinitely: in that case a marquee was held to be a building for planning purposes, even though it could be taken down at anytime and moved. More precisely, Schiemann LJ said that, in order for there to be a sufficient degree of permanence to regard a structure as a building, it must be sited on land ‘for a sufficient length of time to be of significance in the planning context’.<sup>59</sup> The planning inspector was, accordingly, entitled in *Hall Hunter* to regard the shortest period for which the polytunnels were so sited (3 months each) as satisfying this test, and he had not incorrectly applied the required legal test. Taking both the physical and temporal aspects, therefore, the polytunnels displayed a substantial degree of permanence and this was sufficient for the structures to be considered ‘buildings’ on the facts of the case.

A second argument – that the use of polytunnels was now the norm for soft fruit production and should therefore come within the exemption from planning control in Section 55(2)(e) –

---

<sup>58</sup> [2000] 2 PLR 102; [2000] JPL 1025.

<sup>59</sup> [2000] JPL 1025, 1034.

also received short shrift from the court. Operational development on farms is in many cases given permitted development rights<sup>60</sup>. The erection of polytunnels does not, however, qualify for permitted development rights. According to the court in *Hall Hunter*, if changes in agricultural practice mean that new types of agricultural building are required, the solution is for Parliament to alter the General Development Order to permit their erection subject to appropriate conditions. Changes in agricultural practice do not in themselves bring new kinds of development within the agricultural use exemption in the 1990 Act if they involve new buildings or other operational development. An attempt in this case to invoke permitted development rights under Part 4 of Schedule 2 to the General Development Order, which gives permission for temporary buildings and land uses, also failed for the same reason. The placing of caravans in large numbers on the land was also held to be operational development requiring planning consent.

The decision in the *Hall Hunter* was a reminder that, although agriculture receives favourable treatment from the planning regime, it cannot be assumed that new kinds of intensive agricultural practice will benefit from planning exemption if in legal terms they constitute operational 'development'. The most difficult aspect in practice will be assessing whether temporary structures do indeed constitute building operations, or whether they are merely ancillary to an existing agricultural use and therefore exempt from development control. The test endorsed in the *Hall Hunter* case requires a consideration of both the physical permanence of a new structure and the length of time for which it will be on the land before being removed. This is a very broad legal test, and one which gives wide latitude to planning bodies to make different merits-based decisions on the facts of individual cases.

b. *R (on the application of Wye Valley Action Association Ltd) v Herefordshire District Council*

The *Hall Hunter* litigation did not consider an additional implication of subjecting land use changes to planning control – whether they may, in some cases, also be subject to a requirement to carry out an EIA before development consent can be given. The potential for this additional requirement to come into play was subsequently considered in *R (on the application of Wye Valley Action Association Ltd) v Herefordshire District Council*.<sup>61</sup>

In the *Wye Valley Action Association* case a farmer applied for planning permission for polytunnels covering 255 hectares of land, of which no more than 54 hectares would be covered at any one time, and not more than 10 hectares in a single bloc. The whole of the site was in open countryside and within the Wye Valley Area of Outstanding Natural Beauty. It was adjacent to the River Wye Special Area of Conservation and a Site of Special Scientific Interest. Herefordshire District Council adopted a screening opinion in 2008 that 'the application involves the rotation of polytunnels for the purpose of growing soft fruit in the ground and *on land that is already cultivated*...therefore the application will not require an

---

<sup>60</sup> By the Town and Country Planning (General Permitted Development) Order 1995, SI 1995/418, Schedule 2, Part 6 (above n.49).

<sup>61</sup> [2009] EWHC 3428 (Admin), [2010] Env LR 18; [2011] EWCA Civ 20.

environmental statement to be submitted'. This was held to be a material misdirection at first instance, and the grant of planning permission was initially quashed by the High Court. The key finding was that land can be a 'semi-natural area' whether it has been previously cultivated or not. According to Ian Dove QC, sitting as a deputy High Court judge, assuming that land could not be a semi-natural area because it was already under cultivation was a misdirection on a point of law by the planning authority.

This decision was reversed by the Court of Appeal which allowed the appeal and set aside the order quashing the planning permission.<sup>62</sup> Richards LJ accepted that the terminology used in the relevant planning regulations<sup>63</sup> ('semi-natural areas') was inherently imprecise and invited different conclusions when applied to the facts of different cases. The planning committee retained a discretion as to the interpretation of the facts when deciding the first order question – whether the development was within Schedule 2 or not – and on which different planning authorities might legitimately, and rationally, adopt different conclusions

c. *R (on the application of Save Woolley Valley Action Group Ltd) v Bath and North East Somerset Council*

The third - and most recent - decision is *R (on the application of Save Woolley Valley Action Group Ltd) v Bath and North East Somerset Council*.<sup>64</sup> The High Court held that the installation of eight mobile poultry 'sheds' on metal skids was an intensive livestock installation, and that its situation in the Cotswolds Area of Outstanding Natural Beauty meant that it was potentially Schedule 2 EIA Development. The Council had decided that the mobile poultry sheds were not 'development' within the meaning of the Town and Country Planning Act 1990 and that they did not therefore have to address the question whether they were 'EIA Development' within the meaning of the EIA Directive or transposing regulations.<sup>65</sup> The court ruled, however, that the interpretative matrix to be applied in cases requiring a consideration of the application of EIA must be the opposite: if an operation was within the EIA Directive, this must be considered first; and then, if the EIA Directive was engaged, English law must be interpreted so as to give effect to the Directive where possible:<sup>66</sup>

...the definition of development in section 55 TCPA 1990 can, and should, be interpreted broadly by planning authorities so as to include, where possible, projects which require EIA under the EIA Directive or developments which require EIA under the EIA Regulations 1999. Otherwise the Directive will not be effectively implemented in UK law.

---

<sup>62</sup> [2011] EWCA Civ 20

<sup>63</sup> In this case, paragraph 1(a) of Schedule 2 to the Town and Country Planning (Environmental Impact Assessment) (England and Wales) Regulations 1999 SI 1999/293 (now the Town and Country Planning (Environmental Impact Assessment) Regulations 2011 SI 2011/1824).

<sup>64</sup> [2012] EWHC 2161 (Admin) (Lang J.).

<sup>65</sup> I.e. the Town and Country Planning (Environmental Impact Assessment) Regulations 1999 SI 1999/293 (now the Town and Country Planning (Environmental Impact Assessment) Regulations 2011 SI 2011/1824).

<sup>66</sup> [2012] EWHC 2161 (Admin) para. 113

It followed that ‘development’ must be construed broadly in order to secure the effective implementation of the EIA Directive and that, whether or not the sheds were ‘buildings’, they could be considered livestock installations. The fact that the holding concerned was within an Area of Outstanding Natural Beauty meant that it was in a sensitive area and therefore the Schedule 2 thresholds were not applicable. It could be EIA development even if the floor area of the sheds combined did not exceed the indicative threshold of 500 square metres.

*d. ‘Intensive’ Farming and the Natural Environment*

As we have seen, the Agriculture EIA Regulations are only applicable to projects which would subject semi-natural areas to ‘intensive’ agriculture. Similarly, planning bodies may have to make decisions on what constitutes an installation for ‘intensive’ livestock production, or on projects for ‘intensive’ agriculture on semi-natural or uncultivated land, if it involves ‘development’ within the planning rules as interpreted in the cases discussed above. This raises two sets of questions. Firstly, there are questions of scale and benchmarking – how does one identify projects to ‘intensify’ agricultural use? Secondly, there is a wider policy question – why should the law enshrine the assumption that environmental degradation of the countryside is only associated with ‘intensive’ agriculture? The second question raises issues about the extent to which the law should intervene and attempt to regulate the manner in which the natural environment interrelates with farming methods to create and maintain our living countryside.

Prior to the *Wye Valley* case there had been no guidance on the interpretation of the concept of ‘intensive’ agriculture in the context of planning law. This is a question that has already proved problematic, however, in relation to EIA for agricultural projects outwith development control. The EIA Agriculture Regulations only apply to uncultivated land projects if the project is undertaken to *increase the productivity* of uncultivated land or a semi-natural area. This is expressly defined to include ‘projects to increase the productivity for agriculture of such land *to below the norm*’.<sup>67</sup> Such somewhat opaque statutory terminology is intended to remove an interpretative problem that arose under the forerunner of those Regulations, and which was judicially considered in *DEFRA v Alford* – the only case in which the question has been extensively explored.<sup>68</sup> In *Alford* the defendant had resumed possession of a neglected tenant farm in a poor state of husbandry, and (in addition to repairing boundary walls and fences) had applied farmyard manure and calcified seaweed to the land in order to increase its productive value with a view to keeping 40 suckler cows. The High Court overturned his conviction for breach of the precursor to the current EIA Agriculture Regulations, the earlier Regulations being held inapplicable to a project that was concerned to bring land back to ‘a normal level of agricultural productivity’.<sup>69</sup> No indication was offered as to what might be considered ‘normal’ agricultural production for these purposes. This is now of purely academic interest, as it is clear from the current EIA Agriculture Regulations that any operation intended to improve the productivity of the land – whether or not to a ‘normal’ agricultural level of production – will potentially bring an operation within the EIA rules. In the *Wye Valley* case, this was interpreted at first instance to mean that the current (2006) Regulations had

---

<sup>67</sup> EIA Agriculture Regulations, (above n 13) Regulation 2 (italics added).

<sup>68</sup> [2005] EWHC 808 (Admin). For commentary, see D. McGillivray, ‘Restricting the application of EIA for agricultural projects’, (2005) 17 *Journal of Environmental Law* 395.

<sup>69</sup> [2005] EWHC 808 (Admin), para. 27 (Brooke LJ) (the precursor to the EIA Agriculture Regulations being the Environmental Impact Assessment (Uncultivated Land and Semi-natural Areas) (England) Regulations 2001, SI 2001/3966).

been intended to widen the definition of intensive agriculture purposes to include any activity that increased productivity for agriculture.<sup>70</sup> The amount by which they did so was irrelevant. Erecting polytunnels therefore was, in *Wye Valley* itself, *prima facie* an ‘intensive’ land use. This aspect of the first instance decision was not reviewed by the Court of Appeal.

This accords more closely with the environmental policy considerations underlying the EIA Directive, for it is precisely because of its neglected state that land often has a high nature value and requires protection against subsequent intensification of agricultural exploitation. It does, however, extend the reach of environmental regulation far into realms of agricultural land use formerly thought to be exempt from external regulation or control. It is also unclear what this adds to environmental policy on protected areas. There is no necessary correlation between the intensity or otherwise of agricultural production and damage to natural habitats or landscapes. Sometimes very low levels of agricultural use can be damaging to some kinds of natural resource or wildlife habitat: very low levels of sheep grazing can, for example, be highly damaging to limestone pavements, and the exclusion of grazing livestock (for example by fencing off sites) is often the solution sought by the conservation bodies.<sup>71</sup> Yet, in other areas agricultural land use is necessary to maintain the conservation status of protected sites at favourable levels: under-grazing by livestock is, for example, often more damaging than more intensive use, especially if it encourages the encroachment of invasive dwarf shrub populations and bracken. The interaction of agricultural land management with different types of natural habitat and ecosystem is highly complex. While the detrimental impacts of intensive agriculture are well known, the imposition of EIA solely on projects for *increasing* production (‘intensive’ agriculture) is a blunt instrument that fails to capture the sophisticated and complex relationship between agriculture and the natural environment.

## 5. Integrating the Regulatory Orders for Environmental Assessment

In the planning law cases we can see an expansive approach to the first order decision required where EIA is at issue – is the development or activity within the categories in Schedule 2 to the Town and Country Planning (Environmental Impact Assessment) Regulations 2011? The first order decision is a matter of interpretation of the Regulations – is a project for intensive farming on semi-natural land or is it a restructuring project? Or is the project one to introduce an intensive livestock installation? The approach in *Save Woolley Valley* is the most far-reaching of those considered above, but it is significant that this case involved intensive livestock operations, and not an uncultivated land or restructuring project. Development for the provision of intensive livestock installations is not covered by the EIA Agriculture Regulations, and the EIA Directive can in such cases only be given effect under the planning regime – a fact expressly referred to by the court when deciding that ‘installations’ should be given a broad meaning to engage development control in order to secure compliance with the requirements of the Directive.<sup>72</sup>

On the other hand, in cases of land restructuring projects and the conversion of semi-natural land to intensive production, *both* the planning and Agriculture EIA regulations could in

---

<sup>70</sup> [2009] EWHC 3428 (Admin), para. 44 (Ian Dove QC).

<sup>71</sup> For an example (limestone pavements on Ingleborough Common and Scales Moor, North Yorkshire), see C. Rodgers, A. Winchester, E. Straughton and M. Pieraccini, *Contested Common Land: Environmental Governance Past and Present* (Earthscan, 2010) 128ff.

<sup>72</sup> *R (on the application of Save Woolley Valley Action Group) v Bath and North East Somerset Council* [2012] EWHC 2161 (Admin), para. 106 (Lang J.)



principle apply – depending upon whether the activity proposed involves ‘development’ falling within the planning system. In planning cases like *Wye Valley*, therefore, the effective implementation of the EIA Directive does not depend solely upon a wide interpretation of the definition of ‘development’ in the Town and Country Planning Act 1990 so as to ensure that the project is scrutinized for its environmental impacts. If a project falls outside the planning regime, it may still be subject to scrutiny under the EIA Agriculture Regulations.

The interface between the two regimes is nevertheless problematic. In principle, if the courts adopt a wide interpretation of ‘development’ in connection with operations for restructuring and intensification projects, then the scope of planning law would expand and that of agricultural EIA commensurately shrink. In the *Wye Valley* case, however, the Court of Appeal displayed a high level of deference to administrative discretion, although the issue of effective transposition was not argued before the court in the same terms as it was in the *Save Woolley Valley* litigation. The second order decision – whether the project was likely to have significant effects – was left to the planning authority to decide on the merits. Significantly, the Court of Appeal also introduced an element of discretion into the first order decision as well: it was for the decision-maker to decide on the merits whether land was in a ‘semi-natural area’ on the facts of each case. The fact that land had been cultivated did not in itself rule out an interpretation that it was a semi-natural area – but similarly the presence of statutory environmental designations for landscape and/or wildlife protection was also deemed not to be determinative of the area’s status or otherwise as ‘semi-natural’. Ultimately it was a question for the planning body to decide on the merits.

In planning cases the second order decision – is this project ‘likely to have significant effects on the environment?’ – should also focus attention on the application of the precautionary principle. Although the recent cases have expanded the criteria for the first order decision, a narrow approach to the application of the precautionary principle has been applied.<sup>73</sup> Further, in *R (on the application of Loader) v Secretary of State* it was held that for significant impacts to be held to be ‘likely’ (and require an EIA to be conducted) there must be a ‘real risk’ of environmental impacts of the kind required by the EIA Directive, and not a probability of impact.<sup>74</sup> The courts have, again, shown themselves willing to leave this decision to planning bodies for decision on the merits of each case. This is a ‘weak’ interpretation of the precautionary principle in EU environmental law.

In cases where the EIA Agriculture Regulations apply, the lack of application of the precautionary principle is especially notable. This was criticised by research commissioned by English Nature prior to the adoption of the (current) 2006 Regulations and is at odds with the EIA Directive itself – which is expressly based on the application of the precautionary principle – and with other regulatory regimes in environmental law.<sup>75</sup> It also impugns the effectiveness of the EIA “agriculture” regime in preventing damaging land use development. A precautionary approach would be particularly useful, for example, when evaluating projects where the assessment has to be made at a time of the year (typically winter) when a full scientific as-

---

<sup>73</sup> See, e.g. *R (on the application of SAVE Britain’s Heritage) v Secretary of State for Communities and Local Government* [2011] EWCA Civ 334; and *R (on the application of Save Woolley Valley Action Group) v Bath and North East Somerset Council* [2012] EWHC 2161 (Admin).

<sup>74</sup> [2012] EWCA Civ 869, paras. 26-30; and see *R (on the application of Evans) v Secretary of State, Bamburgh District Council and Persimmon Homes Ltd* [2013] EWCA Civ 115, paras. 21 and 22 (Beatson LJ).

<sup>75</sup> See *The Effectiveness of Environmental Impact Assessment (EIA) for Uncultivated Land and Semi Natural Areas*, English Nature Research Report 605 (2004) para. 4.3.

assessment of the effects on vegetation or wildlife is not possible. This might dictate a delay to enable full scientific assessment to be made of the likely implications of a development proposal.

There is also a poor level of integration between the planning and agricultural EIA regimes in their application to projects to intensify farming activities. In principle, the methodology for identifying significant impacts should be the same under both regimes, but currently they are not. As noted above, Natural England uses the JNCC habitat classification system and associated data on the presence of Biodiversity Action Plan habitats and species to inform decisions in ‘agricultural’ EIA cases. In cases under planning law the decision is often based on a much more widely based factual matrix and the thresholds for uncultivated land projects are different. For projects involving development under the planning system the threshold is 0.5 hectares and for agricultural EIA projects it is two hectares – a distinction for which no obvious rationale is apparent.

In ‘agricultural’ EIA cases Natural England can take account of the economic and social consequences of refusing consent to an operation that is likely to have significant impacts. In planning cases, where decisions are made by elected and accountable local government representatives, the evaluation of economic and social factors will be considered in the context of the development plan for the area. The consideration of social and economic factors by the statutory conservation bodies, without reference to the development plan as a basis for decision-making (as occurs in the development control context) would seem beyond their range of experience and expertise as the government’s statutory advisers on nature conservation and biodiversity (to which they bring primarily scientific research expertise). This would also appear on the face of it to be incompatible with the standards required by the 1992 Habitats Directive for the “appropriate” assessment of projects affecting European wildlife sites.<sup>76</sup> These prohibit the use of economic or social criteria in decision-making where a site hosts a priority habitat or species protected by EU law. However, in these cases, the land will be in a protected European site – a Special Area of Conservation or Specially Protected Area – and the assessment required before consent to agricultural operations can be undertaken will in practice be carried out under the Conservation of Habitats and Species Regulations 2010.<sup>77</sup> This will preclude the use of economic criteria to justify granting consent if it would result in damage to a priority protected species or habitats.<sup>78</sup>

Finally, greater attention is required to the degree of integration between the regulatory systems for EIA and the mechanisms for promoting environmental protection within the Common Agricultural Policy. In particular, the EIA provisions should not discourage entry in agri-environmental land management agreements, while land that is semi-natural or uncultivated because it has been in reversion under the Environmental Stewardship scheme (or its predecessors, such as the Environmentally Sensitive Areas programme) should not be drawn

---

<sup>76</sup> See arts. 6.3 and 6.4 of Council Directive 92/43/EEC on the Conservation of Natural Habitats and of Wild Flora and Fauna, [1992] OJ L 206/7

<sup>77</sup> SI 2010/490.

<sup>78</sup> See C. Rodgers, *The Law of Nature Conservation* (Oxford University Press, 2013) 216 ff.

into the regulatory orbit of the EIA regime. This raises questions about how to best protect environmental gains made by publicly funded agri-environmental services agreements.

## 6. Conclusion

This chapter has considered the application of some very technical areas of planning and regulatory law to projects for intensive agriculture, and has illustrated some of the tensions between EU environmental policy and the CAP. But in conclusion we will return to European law, and try to set some of the issues in their wider context. The CJEU has consistently held that the EIA Directive ‘has a wide scope and a broad purpose’ and must be interpreted as such.<sup>79</sup> It is about much more than regulatory land use control. One of its primary objectives is to encourage greater public participation in decision-making about the environment. It is also a key instrument for promoting sustainable development. In planning law, for example, both planning conditions and planning agreements are important instruments for implementing sophisticated settlements to shape development into the future following an EIA.<sup>80</sup> The expansion of the planning regime into decision-making on agricultural projects would encourage greater public participation within the planning regime on rural land projects. The picture under the agricultural EIA regime is less encouraging. The current arrangements for screening agricultural EIA projects ensure that public participation in decision-making is reserved for a tiny minority of cases deemed to be ‘significant’ projects. The process for reviewing land use proposals is also more technocratic than that under the planning system, with a heavy emphasis on scientific criteria and ecology. Further, the UK has one of the smallest proportions of EIAs carried out annually among the Member States of the EU,<sup>81</sup> and it is probably not an exaggeration to say that the approach exemplified in the EIA Agriculture Regulations is typical of a minimalist approach to transposition.

Finally, it is important to remember that the EIA Directive is intended to encourage reflexive and adaptive management of development projects. The identification of alternatives to the project under consideration is key to this approach – making the developer iterate in the Environmental Statement the alternatives that have been considered and, furthermore, explain his/her decision to promote the project in hand by reference to the optimum environmental outcomes. This is fundamental to the wider objectives of the EIA Directive.<sup>82</sup> This is entirely lacking from the EIA Agriculture Regulations, which impose no requirement for the articulation of alternatives to the project under consideration.<sup>83</sup> The approach demonstrated in the EIA Agriculture Regulations is unduly narrow and formal. Moreover, it is difficult to enforce, applying (as it does) to land that is often far from public view and to activities which

---

<sup>79</sup> Case C-72/95 *Aannemersbedrijf P K Kraaijeveld BV v Gedeputeerde Staten Van Zuid-Holland* [1996] ECR I-5403, at I-5444 and I-5446; and see also C-201/02 *R (on the application of Wells) v Secretary of State for Transport Local Government and the Regions* [2004] ECR I-723.

<sup>80</sup> A well known example is furnished by the Cairngorm Funicular Railway EIA, as to which see, *inter alia*, Holder, (above n 19) 272-281.

<sup>81</sup> European Commission, *Study Concerning the Report on the Application and Effectiveness of the EIA Directive* (2009) 69-72; and see European Commission, *Report on the Application and Effectiveness of the EIA Directive* COM (2009) 378.

<sup>82</sup> See Holder, (above n 14) 152-162

<sup>83</sup> The public guidance published by Natural England covers the contents of the Environmental Statement; and these include requirements for the articulation of likely significant effects including direct effects and any indirect, secondary, cumulative, short, medium and long term, permanent positive and negative effects of the project, and the inclusion of a description of measures to reduce prevent or offset any significant adverse effects on the environment – but not an articulation of alternatives to the project: Natural England, ‘Environmental Impact Assessment (Agriculture) (England) (no.2) Regulations 2006: Public Guidance’ (NE311) para. 66.

are often gradual (such as fertilization and over sowing).<sup>84</sup> Unless the regulatory regime for the EIA of rural land projects is rationalized, simplified and better integrated with planning law and the law of the CAP, it will struggle to yield major improvements in the rural environment.

---

<sup>84</sup> This was a criticism originally made ten years ago in *The Effectiveness of Environmental Impact Assessment (EIA) for Uncultivated Land and Semi Natural Areas*, English Nature Research Report 605 (2004): see Executive Summary and para. 3.4. It retains its force.